

MALAYSIAN REPORTS**NEHSONS DEVELOPMENTS LTD. v.
TEH CHIN POH**

[O.C.J. (Mohamed Azmi J.) April 7, 1971]

[Kuala Lumpur — Civil Suit No. 1273 of 1968]

Landlord and Tenant — Recovery of possession — Tenant exposing landlord to penalty or fine by causing unauthorised erection on premises — Notice to terminate tenancy — Municipal Ordinance (S.S. Cap 133), ss. 144(1), (12), 392 — Control of Rent Act, 1966, s. 16(1)(k).

The plaintiff sought to recover possession of a controlled premises of which the defendant was the tenant. The case for the plaintiff was that the defendant, who was a monthly tenant of the said premises, had erected or caused or permitted or suffered an unauthorised erection of a lean-to shed in the said premises thereby exposing the plaintiff to a penalty or fine under the Municipal Ordinance (S.S. Cap. 133). On April 18, 1968 the plaintiff as owner of the controlled premises was charged and convicted on its plea of guilty in the magistrate's court at Kuala Lumpur in respect of the unauthorised erection under section 144(1) of the Municipal Ordinance and was fined \$50. By a notice in writing dated May 10, 1968, the plaintiff terminated the monthly tenancy and requested the defendant to deliver vacant possession of the premises on or before June 30, 1968. The plaintiff claimed vacant possession of the said premises against the defendant under section 16(1)(k) of the Control of Rent Act 1966.

At the outset of the hearing, counsel for the parties agreed that the following were the main issues to be decided: (1) Whether consent of the defendant to the erection of the lean-to shed is relevant to this case; (2) Whether the plaintiff was exposed to a penalty, fine or forfeiture, and was in fact convicted and fined; (3) Whether the notice to terminate the tenancy was valid.

Held: (1) consent of the defendant to the unauthorised erection was not relevant in the present case; this was not a case where the defendant could be said to be completely ignorant of the unauthorised erection; on the evidence the inference was that the unauthorised structure was erected with his knowledge and consent;

(2) (a) section 144(12) of the Municipal Ordinance makes the landlord liable though he was not responsible for the erection; (b) once the landlord had proved that he had been convicted of an offence, it must be assumed until the contrary was proved, that the landlord was exposed to a fine;

(3) the notice to terminate the tenancy was valid.

Cases referred to:-

(1) *Sivasupramaniam v. Public Prosecutor* [1968] 1 M.L.J. 80.

(2) *Tay Sai Hiang v. Tan Ee Keok* [1968] 1 M.L.J. 234.

CIVIL SUIT.

Tan Jake Lian for the plaintiff.

Mah Keng Hock for the defendant.

Cur. Adv. Vult.

Mohamed Azmi J.: This is an action for recovery of possession of a controlled premises known as No. 1, Jalan Pahang, Kuala Lumpur. Briefly, the case for the plaintiff is that the defendant, who is a monthly tenant of the said premises, has erected or caused or permitted or suffered an unauthorised erection of a lean-to shed in the said premises thereby exposing the plaintiff to a penalty or fine under the Municipal Ordinance (S.S. Cap. 133). On April 18, 1968 the plaintiff as owner of the controlled premises was charged

A and convicted on its plea of guilty in the Magistrate's Court at Kuala Lumpur in respect of the unauthorised erection under section 144(1) of the Municipal Ordinance and was fined \$50. By a notice in writing dated May 10, 1968, the plaintiff terminated the monthly tenancy and requested the defendant to deliver vacant possession of the premises on or before June 30, 1968. The plaintiff now claims vacant possession of the said premises against the defendant under section 16(1)(k) of the Control of Rent Act 1966.

At the outset of the hearing, both counsel agreed that the following are the three main issues to be decided in this case:—

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- (1) Whether consent of the defendant to the erection of the lean-to shed is relevant to this case;
 - (2) Whether the plaintiff was exposed to a penalty, fine or forfeiture, and was in fact convicted and fined;
 - (3) Whether the notice to terminate the tenancy is valid.

D On the first and third issues, I do not think it is necessary to deal with them in any great detail as both issues have not in fact been raised or seriously argued by counsel in their submissions. Suffice it for me to say that consent of the defendant to the unauthorised erection is not relevant in the present case, in view of the averment in paragraph 2 of the statement of defence that the breach of the provision of the Municipal Ordinance was committed by the two sub-tenants of the defendant. Further, this is not a case where the defendant can be said to be completely ignorant of the unauthorised erection. On January 12, 1968 when the plaintiff company first received the notice from the Municipality regarding the unauthorised erection with a request to submit plans and specifications, it informed the defendant about it by letter dated January 17, 1968 followed by another letter dated February 8, 1968. The only thing the defendant did was to send letters to his sub-tenants allegedly responsible for the unauthorised erection (Mr. Muthuthapath and Mr. Tan Meow Ling), wherein he held them liable for all damages unless they dismantle the lean-to shed. Incidentally, it should be noted that these letters were sent by registered post to No. 1, Jalan Pahang; and, in my view, it can reasonably be inferred that both the sub-tenants were occupying the premises at the material time. Apparently, nothing else was done by the defendant to avoid the intended prosecution against the plaintiff company, and consequently a summons was issued against the plaintiff company on March 18, 1968, and the unauthorised erection was eventually demolished by the Municipal Authorities. Assuming for a moment that the defendant had not consented to the erection, in my view, the least the defendant could have done was to submit plans and specifications regarding the lean-to shed as requested by the Municipality or, alternatively, to demolish the structure and thereby prevent the plaintiff company from being exposed to conviction. In any event, on the question of credibility, I find the defendant a very unreliable witness. In his desperate attempt to show that he never consented to the unauthorised erection, he went so far as to perjure himself by testifying that the two persons

allegedly responsible for the erection of the lean-to shed were strangers and not his sub-tenants as clearly pleaded in paragraph 2 of the statement of defence and confirmed by the correspondence between counsel for the plaintiff and defendant dated April 20 and 22, 1968. Being the chief tenant and as well as partner of the coffee shop in the premises, I have no hesitation, having regard to all the evidence, in drawing the inference that the unauthorised structure was erected with his knowledge and consent. Similarly, on the third issue, I am satisfied that the notice to terminate the tenancy is valid — there being no attempt made to argue that it is defective in any way.

As regards the second issue, counsel for the defendant does not dispute the fact that the plaintiff company had been charged, convicted and fined as alleged. However, it is submitted that, even if the plaintiff had been convicted, it is not entitled to vacant possession as a matter of course under section 16(1)(k), as the defendant is entitled to prove *aliunde* that the plaintiff was not guilty of the charge and ought not to have been convicted. The following two grounds were given in the submission that the plaintiff would not have been convicted if it had claimed trial to the charge: —

(i) Section 144(1) of the Municipal Ordinance provides:

"Every person intending to erect any building shall submit to the Commissioners plans and specifications of the proposed building prepared in accordance with this Ordinance and the building by-laws. When such plans and specifications are certified by the Municipal Architect or Municipal Engineer to be in accordance with this Ordinance and the Building by-laws, they may be approved by the President on behalf of the Commissioners."

Since the plaintiff did not erect or caused to be erected the unauthorised lean-to shed, it ought not to have been prosecuted and found guilty;

(ii) Section 392 of the Municipal Ordinance provides:

"Except in any case where by reason of the act or omission complained of an injury or danger to health subsists at the date of the complaint no person shall be liable to any fine or penalty under this Ordinance or under any rule or by-law made thereunder for any offence under this Ordinance unless the complaint respecting such offence is made within twelve months next after the commission of such offence."

As the complaint was made more than twelve months of the date of the unauthorised erection, the prosecution against the plaintiff was null and void.

When the decision in the case of *Sivasupramaniam v. Public Prosecutor*⁽¹⁾ was brought to the attention of the learned counsel for the defence, he quite properly abandoned ground No. (i) above. Section 144(12) of the Municipal Ordinance provides:

"Where any building operations are commenced or carried out in respect of any building, they shall be deemed to have been commenced or carried out by the owner of the land whereon such building is erected and he shall be liable therefor."

This sub-section clearly makes the owner of the land on which the unauthorised building is erected liable in any event. This "deeming" provision, which is more or less equivalent to the provision of section 105(1) of the Town Boards Enactment (F.M.S. Cap.

A 137), clearly makes the plaintiff liable although it was not responsible for the erection.

As regards the second ground, I agree that, if the plaintiff can prove that the unauthorised erection was made more than twelve months before the date of complaint, then the plaintiff ought not to have been prosecuted. On this issue there is a conflict of evidence between the defendant (D.W.1) and Mr. Yap Ying Choy (P.W.2), the building inspector attached to the Federal Capital Authority. P.W.2 said under cross-examination that the first time that he went to the said premises was on November 6, 1967. He further said he did not know when the lean-to shed was constructed. However, he said at the time of inspection on November 6, 1967 he knew that the lean-to shed was recently erected as the materials were new. Under re-examination, P.W.2 said he had passed along Pahang Road prior to the date of inspection. He could not remember whether he saw the structure prior to November 6, 1967, but if he had seen it a report would have been made; and in answer to a question put by the court, he finally confirmed that he did not see the said erection prior to November 6, 1967 while he was passing along Pahang Road. On the other hand, the defendant in his evidence alleged that the unauthorised erection was constructed about six or seven years prior to the date of trial, although earlier on he had said he did not know when the structure was erected. As the complaint was made by the Municipal Authority on February 14, 1968 the question of whether the prosecution against the plaintiff was in contravention of section 392 of the Municipal Ordinance must necessarily depend on whether the version of the building inspector or the defendant should be accepted. Having considered the evidence of these two witnesses and observed their demeanour, I am of the view that the evidence of the defendant cannot be relied upon. I find that the defendant's evidence is full of uncertainties. He cannot even remember the income that he derives from his coffee shops, when pressed for a definite answer, he invariably retracted or modified his evidence. As observed earlier on, even on the question of sub-tenancy, the defendant persisted that there was none, although his attention was drawn to paragraph 2 of the statement of defence and also to Exhibit AB9. From his evidence and demeanour, I find the defendant is not a witness of truth. I, therefore, reject his evidence regarding the time when the unauthorised erection was put up. I, however, consider P.W.2 as an independent witness and I accept his evidence that the unauthorised erection was not there prior to November 6, 1967. That being the case, the complaint made on February 14, 1968 is well within the period stipulated under section 392 of the Municipal Ordinance. On the authority of *Tay Sai Hiang v. Tan Ee Keok*⁽²⁾ it was held that once the landlord had proved that he had been convicted of an offence, it must be assumed until the contrary was proved, that the landlord was exposed to a fine. The burden was, therefore, not on the landlord to prove that the complaint was made within the requisite period of twelve months, but on the tenant to prove that the complaint was not made within the requisite period of twelve months. With that Singapore decision, I res-

pectfully agree. Since the onus of proof of this particular issue is on the defendant, he should at least give a positive date when the unauthorised erection was built. As I have rejected the evidence of the defendant on this issue, the defendant has, therefore, failed to prove that the complaint was not made within the requisite period of twelve months.

Finally, it is submitted by counsel for the defendant that the court should exercise its discretion under the second limb of the provision of section 16(1) (k) of the Control of Rent Act in refusing to allow vacant possession if the court considers that such order should not be made. Various grounds were put forward to support the contention why the order should not be made. Of these grounds, only two are worth mentioning. First, it is submitted that the defendant had been a tenant for twenty five years and had paid his rent regularly without fail and during this long period there had been no legal proceedings against him by the landlord or by any other person. I am not impressed by this argument in view of the admitted fact that the defendant is no longer occupying the said premises. He is now residing at a coffee shop No. 459, Jalan Tuanku Abdul Rahman, and is merely an inactive partner in the coffee shop business at No. 1 Jalan Pahang premises. Secondly, it is submitted that, in view of his age, he would be in financial difficulty if the order of vacant possession were to be made. I am equally not impressed by this argument in view of the admitted evidence that the defendant is a partner in a number of coffee shops in and around Kuala Lumpur. He owns 50% share in a coffee shop at Imbi Road, 10% share in a coffee shop in front of the Central Market, Kuala Lumpur, and also $\frac{1}{4}$ share in the coffee shop at No. 1, Jalan Pahang. He was also the sole proprietor of the coffee shop at No. 459, Jalan Tuanku Abdul Rahman, where he now resides, but he has transferred this particular shop to his son as a gift in early 1970. Apart from these partnerships, he also owns an Opel car and the only responsibility which he has is to support his two school-going children. Under the circumstances, the defendant cannot by any stretch of imagination be described as poor.

In the present case, I find the plaintiff had acted very reasonably. As soon as it was served with notice by the Municipality regarding the unauthorised erection, it had informed the defendant immediately regarding the notice and requested him to dismantle the erection. But the defendant did not take any concrete steps to do anything except to send letters to the two sub-tenants of the premises.

Under the circumstances, I give judgment for the plaintiff for an order that the defendant do deliver up vacant possession of the said premises forthwith to the plaintiff and pay double rent for wrongful possession at the rate of \$118.00 a month from the 1st July, 1968 until date of delivery. However, I make no order as to costs. The order for vacant possession shall not, of course, affect the sub-tenants of the premises, if any.

Judgment for the plaintiff.

Solicitors: *Shook Lin & Bok; Mah & Kok.*

A PUBLIC PROSECUTOR v. PHUA THIAN KANG

[A. Cr. J. (Sharma J.) April 23, 1971]

[Muar — Criminal Appeal No. 53 of 1970]

Income Tax — Notice — Call for information — Failure to comply with notice without reasonable excuse — Burden of proof — Evidence Ordinance, 1950, ss. 105 and 114 — Income Tax Act, 1967, ss. 81 and 120(a).

Evidence — Onus of proving "reasonable excuse" — Evidence Ordinance, 1950, s. 105.

In this case the learned magistrate had acquitted the accused on a charge under section 120(a) read with section 81 of the Income Tax Act. The charge against the accused was that he had without reasonable excuse failed to comply with the notice served under section 81. The learned magistrate acquitted the accused without calling for his defence as he found that there was no evidence at all that the defendant failed to furnish the information without reasonable excuse.

Held, allowing the appeal: the onus of proving "reasonable excuse" in this case was on the accused and therefore he should have been called upon to enter on his defence.

Cases referred to:-

- (1) *Jones v. Axen* 1 Ld. Raym. 119 at p. 120; 91 E.R. 976.
- (2) *R. v. Pratten* 6 T.R. 559; 101 E.R. 702.
- (3) *Gill v. Scrivens* 7 T.R. 27; 101 E.R. 838.
- (4) *R. v. Jarvis* 1 East 643 footnote; 102 E.R. 249.
- (5) *R. v. Hazy* 2 Car. & P. 458; 172 E.R. 207.
- (6) *Taylor v. Humphries*, 144 E.R. 216.
- (7) *Davies v. Scarce* L.R. 4 C.P. 172 at p. 175.
- (8) *Morgan v. Hedger* L.R. 5 C.P. 485.
- (9) *Over v. Harwood* [1900] 1 Q.B. 803.
- (10) *R. v. James* [1902] 1 K.B. 540.
- (11) *Emperor v. Dahayabhai* A.I.R. 1941 Bom. 273.
- (12) *Public Prosecutor v. Hambali* [1968] 2 M.L.J. 156.
- (13) *Har Prasad v. Commissioner of Income Tax* A.I.R. 1957 All. 746.
- (14) *Munnalal v. Commissioner of Income Tax* A.I.R. 1957 Nagpur 73.
- (15) *Superintendent and Remembrancer of Legal Affairs to the State of West Bengal v. Sri Iswar Lakhi Janardan Thakur Jew* A.I.R. 1960 Cal. 170.
- (16) *Anil Kumar Ghosh v. The State* A.I.R. 1953 Cal. 408.

G MAGISTRATE'S CRIMINAL APPEAL.

Rahmat bin Jamari (Deputy Public Prosecutor) for the appellant.

Lee Kuan Meng for the respondent.

Sharma J. (delivering oral judgment): This is an appeal by the Public Prosecutor against an order of acquittal made by the magistrate, Batu Pahat, in respect of a charge under section 120(a) read with section 81 of the Income Tax Act, 1967. The charge against the respondent was that he had without reasonable excuse failed to comply with the notice served on him under section 81 of the said Act. The only person who appeared on behalf of the Department of Inland Revenue was P.W.1 who had no personal knowledge of the existence or identity of the respondent but he did produce from the departmental file a copy of the notice which was sent to the respondent under A.R. registered post. This notice was addressed to "Enche Phua Thian Kang, 33E Jalan Suleiman, Batu Pahat." This was also the address given on the postal acknowledgment card and the signature on the